

No. 13862

United States Court of Appeals
For the Ninth Circuit

NELSE MORTENSEN & Co., INC., *Appellant,*

— vs. —

KENNETH S. TREADWELL, Trustee of Puget Sound
Products Co., a corporation, Debtor, and
SEATTLE ASSOCIATION OF CREDIT MEN,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

PETITION FOR REHEARING

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TO THE HONORABLE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT:

Appellant respectfully petitions this court for re-
hearing of the above entitled cause, and for reversal
or modification of the decision filed herein on Septem-
ber 20, 1954, for the reasons hereinafter set out.

The rule is correctly stated in the opinion of the
court that the intention of the owner *at the time of at-
tachment* of fixtures to real estate that they shall be-
come a part thereof is given effect in the State of
Washington.

What was the intention of the owner in the case at
bar?

During 1941 or 1942 the building designed and in-

tended to be used as a "steel fabricating plant" was constructed upon the real estate by the owner. In the building, at the time of original construction, certain electrical wiring, switches, transformers, and switchboard for turning the electric power on and off, and the plumbing, pipes, cranes, fire protection system, and other improvements were installed. Certainly, personal property was used in the construction of the building, but when it was completed all of this personal property—not only the boards, nails, steel and concrete, but also the wiring, pipes, transformers, switchboard, cranes, and fire protection system—became an integral part of the building and improvements. For a period of more than six years this building, and the fixtures and improvements located therein, was used by the owner as a manufacturing plant, without material change or modification.

There surely can be no doubt whatever but that the entire plant was intended by the owner, *at the time of construction*, to be a single integrated plant and permanent improvement, and that all of the component parts thereof, including the electric wiring, switchboard, transformers, pipes and plumbing, and other improvements were a part of the real estate.

Starting, then, with the proposition that the fixtures in question were an integral part of the real estate between 1941 and December 16, 1947, when it was sold to the Puget Sound Products Company, we come to the question of *whether there was a severance* of such fixtures from the real estate. *This question is the sole question here involved*, yet it was treated in a very summary manner in the decision of the court. The

decision is based entirely upon the finding by the referee, adopted by the court, that "it was the intention of the government to segregate this equipment and treat it as personalty." None of the fixtures claimed by appellant have been physically severed from the real estate, even to this date, and if they are severed the property acquired by appellant will be converted from a building suitable for use as a factory to a bare frame of a building without even the facilities for lighting the same or using electric power therein.

To support the *conclusion* of the referee that it was the intention of the government to treat the fixtures claimed by appellant as personalty, the opinion of the court (as well as the Findings of Fact of the referee) refers to the quitclaim deed executed by the United States (Ex. 3, Tr. 83-86), and the mortgages from the Puget Sound Products Co. to the United States (Ex. 9, Tr. 159-162). It is upon these documents, and these alone, that the conclusion that there was a severance of the fixtures from the real estate is based. The opinion of this court contains the following assertions:

(1) "The instrument of quitclaim given by the United States to Puget Sound in consummating the sale divided the property into the parcel of realty with the improvements, by which the buildings and other structures passed as appurtenances, and further expressly conveyed the 'equipment' as personalty."

(2) "The taking back of the real mortgage and the chattel mortgage on these separate properties respectively, precluded the United States from thereafter claiming as to Puget Sound that the

described personalty was an integral part of the realty.”

The first of the foregoing assertions is based solely upon the wording of the quitclaim deed therein referred to, in that, after the description of the real estate, there was a provision for the conveyance of “personal property, machinery and equipment” (Tr. 84) which is particularly described, and which includes most of the items involved herein. Assuming that the official of the War Assets Administration who executed this instrument would have had the power to bind the United States by an *express* declaration of the severance of the fixtures from the real estate (which seems to us to be extremely doubtful), the quitclaim deed does not state, either directly or by implication, that the “equipment” therein referred to is, or shall thereafter be, personal property. On the contrary, the conjunctive “and” used to separate the terms “personal property” and “equipment” directly negatives any idea that it was intended to declare that the equipment therein described was personal property. In truth and in fact, most of the items of property therein described were not personal property, but were equipment which had been permanently affixed to the real estate years before and were fixtures and a part of the real estate. The quitclaim deed nowhere states that they are personal property nor that they are conveyed as such.

The second assertion, that the taking back of chattel mortgage on the machinery and equipment precluded the United States from thereafter claiming that the property therein described was an integral part of

the realty, is answered by the very recent decision of the Supreme Court of the State of Washington, *Parrish v. Southwestern Washington Production Credit Assn.*, 41 Wn.(2d) 586, 250 P.(2d) 973.

Notwithstanding the fact that this case was cited in both the opening and reply briefs of appellant, and discussed at length in the oral argument, no reference to the case, nor to the rule of law set out therein, is made in the decision of the court, except the statement that:

“The law is that if personal property securely attached to the realty is made subject to a chattel mortgage which is thereafter paid off, the ordinary rule controls and in the absence of other circumstances the article is treated as a part thereof.”

The *Parrish* case involved the question as to whether pumps, pipes, attachments, transformers and other property installed and used in connection with a cranberry bog were fixtures or personal property as between the holders of a real estate mortgage and of a chattel mortgage thereon. *The holder of the real estate mortgage herself* had executed, or joined in the execution of, several chattel mortgages upon the identical property in dispute, before the mortgage on the real estate had been given. If the mere *acceptance* of a chattel mortgage on fixtures, as in the case at bar, is to be held to constitute a declaration that the fixtures shall thereafter be personal property, then certainly the *giving* of a chattel mortgage on similar fixtures, as in the *Parrish* case, would be a much stronger declaration to that effect. Those chattel mortgages were

formally signed and acknowledged by the mortgagors, and it was their act, and not the act of the mortgagee, which declared the property to be personal property. Notwithstanding this, the Washington Supreme Court expressly held that the property covered by the chattel mortgages became personal property only insofar as the chattel mortgages themselves were concerned, and that "upon satisfaction of the chattel mortgages, the machinery and equipment involved lost their status as chattels and resumed their original status as fixtures annexed to the land." Even though the holder of the real estate mortgage in that case was one of the former owners of the property, and had executed chattel mortgages on the identical fixtures, and in favor of the same mortgagee, it was held that her real estate mortgage covered the fixtures even as against subsequent chattel mortgages thereon, given to the same mortgagee by the then owner of the property.

The case at bar can not be logically distinguished from the *Parrish* case. The chattel mortgage in favor of the United States was given and accepted as security for the payment of a promissory note, and this note had been paid in full and the mortgage released. The potential severance of the fixtures by reason of the chattel mortgage thereon was terminated, and "the machinery and equipment lost their status as fixtures and resumed their original status as fixtures annexed to the land."

The referee, the District Court, and the United States Court of Appeals, are bound by the decisions of the Supreme Court of the State of Washington as to the substantive law applicable to this case, and in

accordance with the rule stated in the *Parrish* case must hold that there was no severance of the fixtures from the real estate by reason of the acceptance of the chattel mortgage thereon.

Nor, we submit, is there anything inconsistent in the United States accepting a chattel mortgage on the fixtures and equipment, and at the same time accepting a real estate mortgage covering the real estate and the same fixtures appurtenant thereto. Both instruments are given and accepted only as security for the payment of indebtedness, and there is no reason why two mortgages covering, in part, the same property, may not be given. Certainly, the phrase "together with the buildings, structures and improvements located thereon" is susceptible of no other interpretation than that the fixtures which have been made a part of the real estate are covered by the mortgage; and even if this phrase were not used, the description of the real estate alone would be sufficient to include the fixtures.

The effect of the decision in this case would be to permit respondents to remove from the property of appellant all of the equipment with which the building is heated, and furnished with light and power, and all of the facilities installed when the building was constructed for the purpose of making it suitable for a factory, and to convert the building into a bare skeleton. This equipment, much of which would be of little value to respondents, is of great value to appellant, because without it the building is practically useless.

If a creditor of Puget Sound Products Co. had caused the fixtures covered by the chattel mortgage to be sold

at Sheriff's sale, and the purchaser had paid the balance owing on the chattel mortgage, and had attempted to remove from the building all of the fixtures and equipment, leaving the United States with only the land and a bare frame of a building, without lights, heat or electricity, and with no equipment therein, as security for the payment of its mortgage on the real estate, we are sure that not only the United States but also Puget Sound would have protested loudly (and rightly) that most of the equipment covered by the chattel mortgage constituted fixtures, and that the real estate mortgage was prior to any claim of the purchaser.

Likewise, if Puget Sound, itself, after payment of the note secured by the chattel mortgage, had sold or removed from the building the fixtures and equipment therein, leaving only the bare skeleton of a frame building as security for payment of the real estate mortgage, the United States, rightly and properly, would have protested that the fixtures and equipment were subject to its mortgage on the real estate, and that the fixtures could not be removed or disposed of without its consent.

The fact that, after the mortgages on the property had been given to the United States, the Puget Sound Products Co. executed chattel mortgages on the fixtures to other persons is entirely immaterial in this case. These mortgages were subsequent and inferior to both the real estate mortgage and the chattel mortgage in favor of the United States, insofar as the fixtures included therein are concerned.

We respectfully submit that the property acquired by the appellant through the foreclosure of the real estate mortgage included not only the land and buildings, but also the *wiring, transformers, switchboard* and other fixtures and permanent improvements placed upon and attached to the property at the time of the original construction of the manufacturing plant thereon many years ago, as well as the heating system, boiler and pipes installed subsequent to the time the property was acquired by the Puget Sound Products Co., and that this petition for rehearing should be granted, and the decision of the court modified or reversed, for the reasons herein set out.

Respectfully submitted,

LYCETTE, DIAMOND & SYLVESTER,

By: JOSEF DIAMOND,

HERMAN HOWE,

Of Counsel.

Attorneys for Appellant.

CERTIFICATE OF COUNSEL

We, ^{Joseph} Joseph Diamond and Herman Howe, counsel for appellant, do hereby certify that in our judgment the foregoing Petition for Rehearing is well founded, and that it is not interposed for delay.

Joseph Diamond
Herman Howe

